IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 110.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor,
Petitioner,

v.

JACKSONVILLE PAPER COMPANY, ET AL.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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The Respondents will be referred to herein as such or as the Employer and the Petitioner will be referred to as the Administrator.

STATEMENT OF THE CASE.

The Administrator's statement, it seems to us, erroneously throws an atmosphere of willful violations and express disregard of the injunction around the entire appeal. For instance, at pages 6 and 7 of the Petition, the statement

is made that false records were kept with regard to employees whose overtime hours were credited to other employees. The testimony referred to in support of this contention was that the practice was engaged in by a foreman to help his fellow workmen and that this was not only without knowledge of the Employer but against his express orders. (1st R. 197). So with reference to the accumulated hour plan (page 6 of the Petition), while the language quoted was used by the District Court, it is also apparent from the context of the Court's opinion that it paraphrased language used by this Court, in other decisions dealing with such plans for in no sense was there any concealment or falsification of records. On the contrary, the plan was thought to be in accordance with the decision of this Court in *Walling* v. *Belo Corporation*, 316 U.S. 624, and Par. 53 of Interpretive Bulletin No. 4 of the Wage and Hour Administration dealing with the so-called "prepayment plan". The practice with reference to extra labor vouchers referred to on page 6 of the Petition as well as other practices complained of occurred prior to the institution of the original suit in 1940, i.e., during the early days of the Act when there was much confusion and misunderstanding on the part of employers as to its scope and applicability. At any rate, what may have occurred prior to the entry of the Amended Judgment of June, 1943 can hardly have any bearing on the present proceedings especially as the use of extra labor vouchers, the alleged concealment of overtime and the matter of payment of overtime to piece-workers is not involved in the present proceeding. As to piece-workers, the only controversy in the present proceeding involves two employees, one of whom was in sole charge of a separate department and claimed to be exempt—we think with good reason—as an executive-administrative employee. (2nd R. 241). At any rate the District Court pointed out that all the practices now challenged, save the bonus plan, were in existence when the Judgment was entered but none of them were specifically enjoined, and said (2nd R. 1010),

> "All the questions are of such nature and character that defendants are entitled to their day in Court for adjudication of the questions. The parties attempted to secure an adjudication of some of the questions at the former trial but the Court restricted the issues and refused to hear evidence on the questions."

Furthermore the Final Judgment (2nd R. 1013) expressly finds that the violations were not willful.

BRIEF AND ARGUMENT.

The sole purpose of the Administrator is to seek an adjudication by this Court of his right to compel payment of amounts claimed by him to be due under the Act. Congress did not confer such authority upon him. On the contrary, the Statute provides that the employer shall be liable to the employee for such compensation and in an additional equal amount as liquidated damages and continues, (29 U.S.C. Sec. 216)

> "Action to recover such liability may be maintained in any Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . ."

Having so prescribed the form of the remedy, it will be held to be exclusive, *Walling* v. *Miller*, 138 Fed. (2d) 629, 632.

In addition to this remedy for the recovery of wages due conferred upon the employees the Act also affords to the Administrator a remedy by injunction, or by criminal proceedings where the violation is willful.

There is a very good practical reason why Congress refused to give the Administrator the right to couple an action for wages alleged to be due with proceedings to enjoin violations of the Act. By their very nature such proceedings in the name of the Administrator involve practices affecting numerous employees as a class; the right to recover compensation on the other hand is an individual right

which must be determined by the status of the particular employee and not by the activities of the employer. *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Walling* v. *Jacksonville Paper Company*, 317 U.S. 564. Furthermore, the right to to recover requires a determination that the employee during a given work-week devoted a substantial amount of his time to interstate activities. Therefore, it would be necessary in order to adjudicate the amounts due each employee in a situation such as this, to adduce testimony with reference to the duties of each employee, thus unduly burdening the Court with matters not directly involved in the enforcement of the Act and which can more expeditiously be determined in an action brought by the employee individually or on behalf of other employees similarly situated.

While a number of Courts have held that indemnity to the injured party for loss occasioned by the violation of an injunction can only be secured in a civil suit, it is now the general rule, in order to avoid a multiplicity of suits, that fines by way of indemnity to the injured party may be imposed in the equity case, but such fines must not exceed the actual loss to the complainant. *Parker* v. *U. S.*, 153 Fed. (2d) 66; *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.*, 135 Fed. 774; *Eustace* v. *Lynch*, 80 Fed. (2d) 652. This Court has said in *U. S.* v. *United Mine Workers*, 330 U.S. 258, at page 304,

> "Where compensation is extended (in a civil contempt proceeding), a fine is imposed payable to the complainant. Such fine *must, of course, be based upon evidence of complainant's actual loss*," etc.

There is no evidence in the record that the Administrator has sustained a loss in this proceeding. He alone is the complainant and the employees are not parties to the suit. The question arises whether a judgment requiring payment of an amount found by the Court to be due would bar the employees from bringing an independent action, if they should so elect, to recover an additional equal amount as liquidated damages.

The cases cited by the Administrator can readily be distinguished from the case at bar—for instance, the Emergency Price Control Act involved in *Porter* v. *Warner Holding Company*, 328 U.S. 395, expressly authorizes the Administrator to collect the penalty prescribed by the Act under certain circumstances and in *Penfield Co.* v. *Securities and Exchange Commission*, 330 U.S. 585, the Statute expressly authorized the Commission to require the production of records and the fine imposed by the Court in lieu of requiring such production did not enable the Commission to carry out its statutory function, whereas here if the Administrator feels that a defendant is deliberately trifling with the Court and flouting the Act, he can cause criminal proceedings to be instituted. Nor can there be any doubt that under such circumstances the District Court would not hesitate to impose severe penalties for deliberate violations of its injunction orders.

The Administrator has cited a large number of cases in which a consent decree was entered requiring the payment of back wages. These cases, of course, are not authority on the question for, having been consented to, the award of compensation could not thereafter be questioned by the defendant. The error, if any, not being jurisdictional, was waived by the consent. *Flemming* v. *Warshawsky*, 123 Fed. (2d) 622.

We, therefore, respectfully submit that the Circuit Court of Appeals for the Fifth Circuit reached a correct conclusion in *Walling* v. *Crane*, 158 Fed. (2d) 80, and that the Petition for Certiorari should be denied.

Respectfully submitted,

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